No. 90-1738 (5)

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 22.5 of this Court's rules requires that a brief in response to a brief in opposition to a petition for certiorari address "arguments first raised in the brief in opposition." The state of Montana ("State"), acting through the Montana Department of Revenue ("Department"), here posits three new justifications for the Montana Supreme Court's decision that upheld the imposition of beneficial-use taxes on Petitioners. Those grounds are not only novel, they are demonstrably wrong. The State's erroneous arguments are:

(1) that the Montana Legislature's April 24, 1991 enactment of Chapter 621, 1991 Mont. Laws, retroactively amending the State's beneficial-use tax statute, Mont. Code Ann. § 15-24-1203 (1989), eliminated the basis for a claim that the State discriminates against those who contract with the federal government;

(2) that the 1989 Montana Supreme Court decisions in *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990) ("*Pacific Power I*"), and *Portland Gen. Elec. Co. v. Montana Dep't of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990) ("*PGE*"), addressed (a) the constitutionality of the disproportionate taxes imposed on Petitioners consequent to the Department's new "50 percent at the bottom" methodology, and (b) the excessive taxes imposed consequent to the Department's failure to include in its calculations tax-exempt federal transmission capacity between the Garrison substation and the Idaho border; and

(3) that the State Tax Appeals Board ("STAB") asserted jurisdiction over constitutional issues as a part of its review of contested assessment methodology and that, therefore, those constitutional issues are now pending before the Montana Supreme Court in Petitioners' appeal from the STAB order.[1]

Unless this Court grants review, Petitioners will suffer the imposition of tens of millions of dollars of contested beneficial-use taxes without having obtained impartial judicial review of their significant constitutional claims.

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[1] The Department makes several other new arguments that, while erroneous, do not directly involve issues of constitutional significance. First, the Department erroneously asserts that Petitioners are the largest providers of electric power in the State. Department Brief in Opposition at i & 6. This is not so; by any measure, the two largest providers of electric power in Montana are the Montana Power Company (a Petitioner) and the Montana-Dakota Utilities Company (not a Petitioner). Pacific Power & Light Company (a Petitioner) serves only a small segment of territory in the northwest corner of the State. Second, the Department overstates the scope of contractual rights Petitioners have negotiated with the Bonneville Power Administration ("BPA") when it asserts that Petitioners can use the federal transmission facilities "to the exclusion of all others for the entire life of those power lines." *Id.* at i. This statement wilfully ignores such transactions as the BPA's transmission of WAPA power to the Central Valley Project in California. Finally, although not technically an error, the State's insertion of non-record material into its appendix (*e.g.*, the assessors' lists of "users" of state-owned railroad rights-of-way) violates the most basic notions of appellate review.

ARGUMENT

The State of Montana has gone to extraordinary lengths to prevent Petitioners from obtaining from this Court an impartial assessment of the challenged beneficial-use tax. These efforts, involving all three branches of government, unwittingly highlight the importance of the issues presented in the pending petition.

A. Retroactive State Legislation.

The Department cites the Montana Legislature's April 24, 1991 amendment to the Montana beneficial-use statute as justifying its argument that the State does not discriminate against those who contract with the federal government. Department Brief in Opposition at 12 & n.9. The chronology itself should spark interest: The amendment occurred just when Petitioners were putting the final touches on their petition for certiorari, *i.e.*, long after Petitioners informed the Montana Supreme Court that that court had relied upon a mistaken premise in arriving at its decision, *viz.*, that only nonprofit entities leased State-owned railroad property. *See* App. A21, A23-A24. Of course, instead of addressing its mistake, the Montana Supreme Court simply denied the petition for rehearing without opinion. App. A47. Even though the Montana Supreme Court appeared to sink into embarrassed silence, there obviously was *some* communication among the State's governmental branches, for the Montana Legislature crafted a fix; specifically, it changed the beneficial-use statute retroactively to exempt from taxation lessees of

federally owned railroad property.[2] The cynicism of these efforts is reflected by the fact that there neither were nor are any lessees of federally owned railroad property in Montana; this retroactive amendment can have *no* effect whatsoever upon the imposition or collection of beneficial-use taxes.

In sum, instead of addressing the substance of Petitioners' claim--that the State cannot favor its own lessees while inflicting taxes on those who contract to transmit power over federal facilities[3]--the Montana Supreme Court evaded the issue first by relying upon a demonstrably false rationale, *viz.*, that all lessees of state railroad property are nonprofit organizations. When the error of that position was pointed out and an opportunity given to correct or clarify its decision, the Montana Supreme Court sat in silence. Realizing the infirmity in the opinion of its sister branch, however, the Montana Legislature then improvised an amendment to the beneficial-use statute that was designed solely to deflect attention from the State's discriminatory tax structure. These concerted, cooperative inter-branch shenanigans again highlight the immense difficulty Petitioners have encountered in obtaining a fair and impartial adjudication of their

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[2] As noted in the State's brief at 12 n.9, the Montana Legislature enacted Ch. 621, 1991 Mont. Laws, which inserted the words, "owned by the United States" after the words "right-of-way or track" in the State's beneficial-use tax statute, Mont. Code Ann. § 15-24-1203.

[3] *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960); *United States v. City of Manassas, Va.*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988).

significant constitutional challenges. The State of Montana knows that its beneficial-use statute cannot survive the scrutiny that this Court would give it, and therefore it can only try to distract.

B. Limited Scope of Prior Decisions.

The Department's second novel-but-wrong assertion is that two discrete constitutional claims that arose first in tax years subsequent to those involved in *Pacific Power I* and *PGE* had in fact been decided in those two prior cases. *See* Department Brief in Opposition at 11. Those claims challenge (1) the Department's new "half at the bottom" approach--a methodology that always imposes higher taxes on users of federally owned property than those users would have paid had they owned property outright--and (2) the Department's failure to account for tax-exempt federal transmission facilities between Garrison and Taft in calculating the amount of Petitioners' beneficial-use taxes on those particular facilities. Neither of these claims arose until the 1986 tax year; indeed, the Department did not even commence imposing beneficial-use taxes on account of the Garrison-Taft transmission facilities until 1986. Therefore, the State's assertion that these issues were addressed and decided in the prior litigation is flatly wrong.

C. The STAB Decision.

The Department's third new argument, also utterly lacking in foundation in the record, is its assertion that the questions of unconstitutional discrimination are not ripe for review because they were first presented to STAB, as opposed to the

District Court, and that the STAB decision is awaiting judicial review in State court. Department Brief in Opposition at 14-16. The Department's manifest error--indeed, its deception--can be readily perceived with no more than a reading of the STAB decision, reprinted at App. A92. The STAB decision addressed only one issue: Assuming that the beneficial-use taxes are constitutional, could the State legitimately impose beneficial-use taxes on the Garrison-Taft facilities in tax year 1986? Constitutional issues were never even presented to STAB.

A sense of how far the Department (and, by extension, the State) will go to avoid this Court's review can be gained by examining the Department's own contradictory arguments to the Montana Supreme Court. In its August 10, 1990 brief to the Montana Supreme Court in this docket, the Department argued that all constitutional issues must be presented to the judiciary because STAB's jurisdiction is limited to reviewing methodological, as opposed to constitutional, questions. In support of its argument, the Department cited with approval the following quotation from *Larson v. State*, 166 Mont. 449, 534 P.2d 854 (1975):

> "Tax appeal boards are particularly suited for settling disputes over the appropriate valuation of a given piece of property or a particular improvement, and the judiciary cannot properly interfere with that function. *Blair v. Potter*, 132 Mont. 176, 315 P.2d 177. The instant case does not concern the value of a specific tract of land within Lewis and Clark County, but rather the constitutional and statutory correctness of implementing a dis-

> criminatory reappraisal. That determination is an appropriate function of the courts." Id. at 166 Mont. 457, [534 P.2d 854 (1975)].

Department Brief to Montana Supreme Court at 20-21 (Aug. 10, 1990). In contrast to its present brief to this Court, the Department did not try to confuse the Montana Supreme Court by arguing that a variety of claims had been presented to STAB; there, the Department told the Montana Supreme Court the truth:

> The Colstrip owners were content to present one challenge to the State Tax Appeal Board. That question was whether the 1986 beneficial use assessments for the Garrison to Taft 500 kv facilities were appropriate. They waived any and all other methodological and statutory challenges.

Department Brief to Montana Supreme Court at 23 n.29. In sum, all constitutional issues raised in Petitioners' complaint were presented to the Montana judiciary in the first instance, and all of those issues are therefore now ripe for review.

CONCLUSION

All three governmental branches of the State of Montana have combined in an effort to prevent this Court from considering the important constitutional issues raised by the State's unprecedented imposition of beneficial-use taxes on federal electric power transmission facilities. First, the judicial branch refused to consider two critical new constitutional claims and, when it did consider a third claim, it relied exclusively on an erroneous assumption of fact

that was not even mentioned in the record of the proceedings below. Given a chance to correct, explain or clarify its error, however, the Montana Supreme Court simply shrugged and turned away.

The judicial silence spurred the legislative branch to action; knowing that no legal rationale could overcome the Montana Supreme Court's obvious error, the Montana Legislature retroactively changed the beneficial-use statute in a transparent attempt to fool this Court into believing that the beneficial-use statute no longer discriminates against those who contract with the federal government. The amendment, however, changed nothing; the State will lose not one cent in tax revenue.

Finally, the executive branch, acting through the Department, is willing to adopt contradictory positions and arguments before different tribunals depending solely upon its perception of partisan advantage. For example, it told the Montana judiciary that all constitutional issues were ready for that court's determination and that STAB cannot hear constitutional issues. Now, however, the Department attempts to lead this Court into error by asserting that STAB heard the constitutional challenges and that those challenges will not be ripe until judicial review of the STAB decision is completed. In addition, the Department now tells this Court that constitutional claims that first arose in 1986 somehow had been decided in litigation involving the 1984 and 1985 tax years. Only two years ago, a member of the Montana Supreme Court remarked, "One has to be fast to keep up with this Court." *Peretti v. State*, 238 Mont. 239, 246, 777 P.2d 329, 334 (1989) (Sheehy, J., dissenting). The efforts expended by the State to preclude Peti-

tioners from obtaining meaningful judicial review suggest that Justice Sheehy's remark can safely be applied to all three branches of State government.

The constitutionality of Montana's beneficial-use tax experiment is far too important a question to be buried under a pile of hastily concocted ex-post rationalizations. Petitioners have paid over $20 million into the coffers of the State; in return, they desire nothing more than one tribunal willing to give full and fair consideration of their federal constitutional claims. The record in this docket, together with the State's new arguments in opposition to review, establishes that Petitioners are simply unable to obtain such a review in the State's court

system. For these reasons, Petitioners respectfully urge this Court to grant the requested petition for certiorari.

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Respectfully submitted,

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